

**KELLER LENKNER LLC**

Ashley C. Keller (*admitted pro hac vice*)  
150 N. Riverside Plaza, Suite 4270  
Chicago, IL 60606  
Telephone: (312) 741-5222  
ack@kellerlenkner.com

**KELLER LENKNER LLC**

U. Seth Ottensoser (*admitted pro hac vice*)  
1330 Avenue of the Americas, Suite 23A  
New York, NY 10019  
Telephone: (212) 653-9715  
so@kellerlenkner.com

**LABATON SUCHAROW LLP**

Christopher J. Keller  
Eric J. Belfi  
David J. Schwartz  
Francis P. McConville  
140 Broadway  
New York, NY 10005  
Telephone: (212) 907-0700  
Facsimile: (212) 818-0477  
ckeller@labaton.com  
ebelfi@labaton.com  
dschwartz@labaton.com  
fmconville@labaton.com

*Counsel for the Tesla Investor Group and  
Proposed Co-Lead Counsel for the Class*  
[Additional counsel on signature page]

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

KALMAN ISAACS, on behalf of himself and  
all others similarly situated,

Plaintiff,

v.

ELON MUSK and TESLA, INC.,

Defendants.

Case No. 3:18-cv-04865-EMC

**CLASS ACTION**

**NOTICE OF MOTION AND MOTION OF  
THE TESLA INVESTOR GROUP FOR  
CONSOLIDATION, APPOINTMENT AS  
LEAD PLAINTIFF AND APPROVAL OF  
SELECTION OF COUNSEL;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

Date: November 15, 2018  
Time: 1:30 p.m.  
Courtroom: 5 – 17th Floor  
Judge: Hon. Edward M. Chen

(caption continues on the following pages)

WILLIAM CHAMBERLAIN, Individually  
and on Behalf of All Others Similarly Situated,

Plaintiff,

v.

TESLA INC., and ELON MUSK,

Defendants.

Case No. 3:18-cv-04876-EMC

JOHN YEAGER, Individually and on Behalf  
of All Others Similarly Situated,

Plaintiff,

v.

TESLA, INC. and ELON MUSK,

Defendants.

Case No. 3:18-cv-04912-EMC

CARLOS MAIA, Individually and on Behalf  
of All Others Similarly Situated,

Plaintiff,

v.

TESLA, INC. and ELON R. MUSK,

Defendants.

Case No. 3:18-cv-04939-EMC

KEWAL DUA, Individually and on Behalf of  
All Others Similarly Situated,

Plaintiff,

v.

TESLA, INC. and ELON MUSK,

Defendants.

Case No. 3:18-cv-04948-EMC

*(caption continues on the following page)*

JOSHUA HORWITZ, Individually and on  
Behalf of All Others Similarly Situated,

Plaintiff,

v.

TESLA INC., and ELON R. MUSK,

Defendants.

Case No. 3:18-cv-05258-EMC

ANDREW E. LEFT, Individually and on  
Behalf of All Others Similarly Situated,

Plaintiff,

v.

TESLA INC., and ELON R. MUSK,

Defendants.

Case No. 3:18-cv-05463-EMC

ZHI XING FAN, Individually and on Behalf of  
All Others Similarly Situated,

Plaintiff,

v.

TESLA INC., and ELON R. MUSK,

Defendants.

Case No. 4:18-cv-05470-EMC

SHAHRAM SODEIFI, Individually and on  
Behalf of All Others Similarly Situated,

Plaintiff,

v.

TESLA, INC., a Delaware corporation, and  
ELON R. MUSK, an individual,

Defendants.

Case No. 3:18-cv-05899-EMC

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**NOTICE OF MOTION AND MOTION**

**TO: ALL PARTIES AND THEIR COUNSEL OF RECORD**

**PLEASE TAKE NOTICE** that Lead Plaintiff movants Andrew E. Left, PROtecto Informatikai Szolgáltató Korlátolt Felelősségű Társaság, Thierry Boutin, Dr. Abrar Shirazi, and Vilas Capital Management, LLC (collectively, the “Tesla Investor Group”), by and through their counsel, hereby move this Court in Courtroom 5-17th Floor of the Honorable Edward M. Chen at the United States District Court, Northern District of California, San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, California 94102, on November 15, 2018 at 1:30 p.m., or as soon thereafter as the matter may be heard, for the entry of an Order: (1) consolidating the above-captioned related actions pursuant to Rule 42(a) of the Federal Rules of Civil Procedure; (2) appointing the Tesla Investor Group as Lead Plaintiff pursuant to the Private Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. §78u-4, *et seq.*; (3) approving the Tesla Investor Group’s selection of Keller Lenkner LLC (“Keller Lenkner”) and Labaton Sucharow LLP (“Labaton Sucharow”) as Co-Lead Counsel and Kerr & Wagstaffe LLP as Liaison Counsel for the Class (the “Motion”); and (4) granting such other and further relief as the Court may deem just and proper.

This Motion is made on the grounds that the Tesla Investor Group believes it is the “most adequate plaintiff” under the PSLRA and should therefore be appointed Lead Plaintiff. Specifically, the Tesla Investor Group believes it has the “largest financial interest” in the relief sought by the Class in this litigation. The Tesla Investor Group is a small, cohesive group of investors with a substantial financial stake in the litigation that will provide effective monitoring and supervision of counsel. The Tesla Investor Group also otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure (“Rule 23”) because its claims are typical of other Class members’ claims, and because it will fairly and adequately represent the Class.

This Motion is based upon the accompanying Memorandum of Law in support thereof, the Declaration of James M. Wagstaffe (“Wagstaffe Decl.”) filed herewith, the pleadings and other filings herein, and such other written or oral argument as may be permitted by the Court.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. STATEMENT OF THE ISSUES TO BE DECIDED**

1. Whether the Court should consolidate the above-captioned related class actions pursuant to Rule 42(a) of the Federal Rules of Civil Procedure;

2. Whether the Court should appoint the Tesla Investor Group as Lead Plaintiff pursuant to 15 U.S.C. § 78u-4(a)(3)(B); and

3. Whether the Court should approve of the Tesla Investor Group’s selection of Keller Lenkner and Labaton Sucharow as Co-Lead Counsel for the Class, and Kerr & Wagstaffe LLP as Liaison Counsel, pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v).

**II. PRELIMINARY STATEMENT**

The Tesla Investor Group—comprised of sophisticated and experienced investors with collective losses in excess of **\$4.5 million** on their transactions in Tesla securities—respectfully submits that it should be appointed Lead Plaintiff in this litigation on behalf of all injured purchasers and sellers (the “Class”) of Tesla Inc. (“Tesla” or the “Company”) securities between August 7, 2018 and August 17, 2018, inclusive (the “Class Period”). All of the above-captioned actions charge Tesla and its Chief Executive Officer Elon Musk (collectively, “Defendants”) with violations of the Securities Exchange Act of 1934 (the “Exchange Act”) and SEC Rule 10b-5 promulgated thereunder.

In securities class actions, the PSLRA requires district courts to resolve consolidation before appointing a lead plaintiff. *See* 15 U.S.C. § 78u-4(a)(3)(B)(ii). Here, the actions should be consolidated because they each involve identical legal and factual questions. *See* Fed. R. Civ. P. 42(a); § IV.A., *infra*.

As soon as practicable after its decision on consolidation, pursuant to the PSLRA, this Court is to appoint the “most adequate plaintiff” to serve as lead plaintiff. 15 U.S.C. §78u-4(a)(3)(B)(i). In that regard, the Court is required to determine which “person or group of persons” of the Class has the “largest financial interest” in the relief sought in this litigation, and also whether that movant has made a *prima facie* showing that it is a typical and adequate Class representative under Rule 23. 15 U.S.C. §78u-4(a)(3)(B)(iii)(I).



1           The Tesla Investor Group respectfully submits that it should be appointed Lead Plaintiff  
 2 because it has the “largest financial interest” in this litigation and has made the requisite showing  
 3 of typicality and adequacy required by the standards of the PSLRA. As set forth in detail below,  
 4 the Tesla Investor Group incurred more than **\$4,582,035** in combined losses as a result of its  
 5 transactions in Tesla securities during the Class Period.<sup>1</sup> In light of this significant loss, the  
 6 Tesla Investor Group has a substantial financial interest in the relief sought by this litigation—an  
 7 interest believed to be greater than that of any competing movant.

8           The Tesla Investor Group also meets the typicality and adequacy requirements of Rule 23  
 9 as required by the PSLRA, because its claims are typical of those of absent Class members, and  
 10 because it will fairly and adequately represent the interests of the Class. The Tesla Investor  
 11 Group, a small, cohesive group of sophisticated investors—composed of experienced investors  
 12 who were long-only buyers who purchased shares in anticipation of a go-private transaction,  
 13 short sellers who bought to cover their positions, and investors who traded options in reliance on  
 14 Elon Musk’s misstatements—provides the Class with the broadest representation and ensures  
 15 that the interest of all Class members will be adequately represented and protected in this  
 16 litigation. Accordingly, the Tesla Investor Group is the “most adequate plaintiff” and should be  
 17 appointed Lead Plaintiff.

18           Further, as set forth in greater detail in the Joint Declaration of the Tesla Investor Group  
 19 (“Joint Decl.”) submitted herewith, each group member fully understands the Lead Plaintiff’s  
 20 obligations to the Class under the PSLRA, and is willing and able to undertake the  
 21 responsibilities of the Lead Plaintiff to ensure the vigorous prosecution of this action. *See*  
 22 Wagstaffe Decl. Ex. D. As part of their effort to formalize their leadership over this action,  
 23 representatives from the Tesla Investor Group held a joint conference call to discuss the merits of  
 24  
 25

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26 <sup>1</sup> Copies of the PSLRA-required Certifications are attached as Exhibit A to the  
 27 accompanying Wagstaffe Decl., which sets forth all transactions for members of the Tesla  
 28 Investor Group in Tesla securities during the Class Period. In addition, a chart reflecting the  
 calculation of the Tesla Investor Group’s losses as a result of its Class Period transactions in  
 Tesla shares is attached as Exhibit B to the Wagstaffe Decl.

1 the actions, their shared desire to maximize the recovery for all Class members, as well as their  
 2 joint litigation strategy, which includes, among other things, the attached proposed motion to  
 3 partially lift the PSLRA discovery stay (*see* Wagstaffe Decl. Ex. H)—providing further evidence  
 4 of their commitment and ability to effectively prosecute this action.

5 The Tesla Investor Group has also demonstrated its adequacy through its selection of  
 6 Keller Lenkner and Labaton Sucharow as Co-Lead Counsel on behalf of the Class. Both law  
 7 firms are nationally recognized firms that have collectively recovered billions of dollars for the  
 8 benefit of injured investors, and have the expertise and resources necessary to handle litigation of  
 9 this complexity and scale. Moreover, Kerr & Wagstaffe LLP, a San Francisco-based firm, also  
 10 has a distinguished record representing plaintiffs in securities class actions such as the instant  
 11 case.

12 Accordingly, the Tesla Investor Group requests that the Court appoint it as Lead Plaintiff  
 13 for the Class and otherwise grant its Motion.

### 14 **III. FACTUAL BACKGROUND**

15 Tesla is a publicly traded company that manufactures and sells electric cars. As detailed  
 16 below, Defendants artificially manipulated the price of Tesla securities to harm the Company's  
 17 short-sellers, and in the process, injured many investors in Tesla securities by issuing materially  
 18 false and misleading information. Defendants' fraudulent scheme started on August 7, 2018,  
 19 when Defendant Musk, via his verified personal Twitter account, issued the following tweet:  
 20 "Am considering taking Tesla private at \$420. Funding secured." Later that day, Defendant  
 21 Musk issued another tweet, stating: "Investor support is confirmed. Only reason why this is not  
 22 certain is that it's contingent on a shareholder vote."

23 Following these tweets, Tesla's stock price surged, reaching an intraday high of \$387.46  
 24 per share, before closing at \$379.57 per share August 7, 2018, a nearly 11 percent jump from the  
 25 previous closing price. Trading volume spiked to 30 million shares (compared to an average  
 26 daily volume of 8 million), representing over \$11 billion of purchases in the open market. In  
 27 response to the tweets, many Tesla short-sellers were forced to cover their positions at artificially  
 28 high prices, losing approximately \$1.3 billion in a single day, according to media reports.

1 Questions about the veracity of Musk's tweets began to emerge late in the day on August  
2 8, 2018, when *The Wall Street Journal* published an article entitled "SEC Probes Tesla CEO  
3 Musk's Tweets," reporting that U.S. regulators were inquiring into whether "Elon Musk was  
4 truthful when he tweeted that he had secured funding" for the proposed buyout of Tesla.  
5 According to the report, SEC officials wanted to know if Musk had a "factual basis" for posting  
6 "that the going-private transaction was all but certain, with only a shareholder vote needed to  
7 pull it off."

8 Based on the uncertainty of the deal, and news of the SEC probe, Tesla's stock price fell  
9 \$9.23 per share, or 2.43 percent, to close at \$370.34 on August 8, 2018. Then, on the next day,  
10 August 9, 2018, Tesla's stock price fell an additional \$17.89 per share, or 4.83%, to close at  
11 \$352.45 per share.

12 On August 13, 2018, Musk tweeted: "I'm excited to work with Silver Lake and Goldman  
13 Sachs as financial advisors, plus Wachtell, Lipton, Rosen & Katz and Munger, Tolles & Olson as  
14 legal advisors, on the proposal to take Tesla private." In response to this Tweet, on August 13,  
15 2018, Tesla shares hit an intra-day high of \$363.19 per share.

16 On August 14, 2018, contrary to Musk's previous day tweets, *Bloomberg* published an  
17 article entitled "Goldman's Missing Mandate Adds to Clues Musk Tweeted Out of Turn,"  
18 reporting that neither Goldman Sachs nor Silver Lake were yet working with Musk pursuant to a  
19 signed agreement or in an official capacity when Musk said on Twitter late Monday, August 13,  
20 2018, both firms were working with him as financial advisers.

21 Following these revelations, Tesla's stock price fell \$8.77 per share, or 2.46 percent, to  
22 close at \$347.64 per share on August 14, 2018.

23 On August 16, 2018, after the market close, *The New York Times* published an in-depth  
24 interview with Musk entitled "Elon Musk Details 'Excruciating' Personal Toll of Tesla  
25 Turmoil," which revealed the stress Musk had been under, his use of Ambien, and the manner in  
26 which the August 7, 2018 tweet had been conceived.

27 On this news, Tesla's stock price fell \$29.95 per share or 8.92 percent, to close at  
28 \$305.50 per share on August 17, 2018.

1 Defendant Elon Musk artificially manipulated the price of Tesla securities with multiple  
 2 objectively false tweets in order to “burn” the Company’s short-sellers. In the succeeding days,  
 3 despite additional false and misleading Musk tweets, the truth regarding the supposedly “secure”  
 4 financing needed to effectuate the going-private transaction began to emerge, exposing the  
 5 fraudulent scheme, and in the process, injuring Class Period investors as the price of Tesla  
 6 securities deteriorated rapidly.

7 As a result of Defendants’ wrongful acts and misleading statements, and the precipitous  
 8 artificial inflation in the market value of the Company’s securities and subsequent decline, the  
 9 Tesla Investor Group and other Class members have suffered significant losses and damages.

#### 10 **IV. ARGUMENT**

##### 11 **A. The Actions Should Be Consolidated**

12 Rule 42(a) of the Federal Rules of Civil Procedure states that “[i]f actions before the  
 13 court involve a common question of law or fact, the court may: (1) join for hearing or trial any or  
 14 all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to  
 15 avoid unnecessary cost or delay.” *Hughes v. Experian Info. Sols., Inc.*, No. 16-cv-05681-JST,  
 16 2017 WL 975969, at \*1 (N.D. Cal. Mar. 13, 2017); *see also Takeda v. Turbodyne Techs., Inc.*, 67  
 17 F. Supp. 2d 1129, 1132-33 (C.D. Cal. 1999). The PSLRA contemplates consolidation where  
 18 “more than one action on behalf of a class asserting substantially the same claim or claims  
 19 arising under this chapter has been filed.” 15 U.S.C. 78u-4(a)(3)(B)(ii). As such, the PSLRA  
 20 does not displace the traditional legal standards for consolidation under Fed. R. Civ. P. 42(a).

21 Consolidation of the above-captioned actions is proper where, as here, the actions involve  
 22 common questions of law and fact such that consolidation would prevent unnecessary cost or  
 23 delay in adjudication. Each of the actions has been filed in this District alleging similar factual  
 24 and legal grounds to support allegations of violations of the Exchange Act arising from the  
 25 public dissemination of false and misleading information to investors. Accordingly, the actions  
 26 should be consolidated pursuant to Fed. R. Civ. P. 42(a) for all purposes.

**B. The Tesla Investor Group Should Be Appointed Lead Plaintiff**

The Tesla Investor Group respectfully submits that it is the presumptively “most adequate plaintiff” because it has complied with the PSLRA procedural requirements, holds the largest financial interest of any qualified movant, and otherwise satisfies Rule 23’s typicality and adequacy requirements.

**1. The PSLRA Standard For Appointing Lead Plaintiff**

The PSLRA provides a straightforward, sequential procedure for selecting lead plaintiff for “each private action arising under [the Exchange Act] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.” *See* 15 U.S.C. § 78u-4(a)(1); *see also* 15 U.S.C. § 78u-4(a)(3)(B). First, Section 21D(a)(3)(A)(i) of the Exchange Act, as amended by the PSLRA, specifies that:

Not later than 20 days after the date on which the complaint is filed, the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class --

(I) of the pendency of the action, the claims asserted therein, and the purported class period; and

(II) that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.

15 U.S.C. § 78u-4(a)(3)(A)(i).

Next, under the PSLRA, a court is to consider any motion made by class members and appoint the movant that the court determines to be most capable of adequately representing the interests of the class as lead plaintiff. Specifically, the PSLRA provides that a court:

shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members (. . . the “most adequate plaintiff”) . . . .

15 U.S.C. § 78u-4(a)(3)(B)(i).

In adjudicating a lead plaintiff motion, a court shall adopt a presumption that the “most adequate plaintiff” is the person or group of persons who: (1) filed a complaint or made a motion

to serve as lead plaintiff; (2) has the largest financial interest in the relief sought by the class; and (3) otherwise satisfies the requirements of Rule 23. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). This presumption “may be rebutted only upon proof . . . that the presumptively most adequate plaintiff [] will not fairly and adequately protect the interests of the class” or “is subject to unique defenses that render such plaintiff incapable of adequately representing the class.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II); *see also In re Spectrum Pharm., Inc.*, No. 2:13-cv-00433-LDG (CWH), 2014 WL 1394162, at \*2 (D. Nev. Mar. 20, 2014).

### **C. The Tesla Investor Group Is The “Most Adequate Plaintiff”**

#### **1. The Tesla Investor Group Satisfied The PSLRA’s Procedural Requirements**

The Tesla Investor Group filed this motion to serve as Lead Plaintiff in a timely manner. Pursuant to 15 U.S.C. § 78u-4(a)(3)(A)(i), on August 10, 2018, Keller Lenkner, counsel in the first-filed action, caused notice regarding the pending nature of this case to be published on *PR Newswire*, a widely circulated, national, business-oriented news reporting service. *See* Notice, Wagstaffe Decl. Ex. C. Thus, as permitted by the PSLRA, any person or group of persons may apply to be appointed Lead Plaintiff within sixty (60) days after publication of the notice, *i.e.*, on or before October 9, 2018. The Tesla Investor Group filed its motion within the required period.

#### **2. The Tesla Investor Group Has The Largest Financial Interest In The Outcome Of The Action**

The PSLRA instructs the Court to adopt a rebuttable presumption that the “most adequate plaintiff” for lead plaintiff purposes is the movant with “the largest financial interest in the relief sought by the class,” so long as the movant “otherwise satisfies the requirements of Rule 23.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I); *see Pace v. Quintanilla*, No. 2:14-cv-2067-DOC-KES, 2014 WL 4180766 (C.D. Cal. Aug. 19, 2014) (discussing the PSLRA’s lead plaintiff appointment process).

During the Class Period, the Tesla Investor Group suffered substantial losses of **\$4,582,035.74** as a result of its transactions in Tesla securities. *See* Loss Analysis, Wagstaffe Decl. Ex. B. The Tesla Investor Group is presently unaware of any other movant with a larger financial interest in the outcome of the Action. Consequently, and because it also satisfies Rule

23's typicality and adequacy requirements, the Tesla Investor Group is entitled to the legal presumption that it is the most adequate plaintiff.

### 3. The Tesla Investor Group Otherwise Satisfies Rule 23's Typicality And Adequacy Requirements

In addition to possessing the largest financial interest in the outcome of the litigation, the Tesla Investor Group satisfies the applicable requirements of Rule 23. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc). On a motion to serve as Lead Plaintiff, the moving plaintiff must make only a preliminary showing that the adequacy and typicality requirements under Rule 23 have been met. *See, e.g., In re MGM Mirage Sec. Litig.*, No. 2:09-cv-01558-GMN-LRI, 2010 WL 4316754, at \*2 (D. Nev. Oct. 25, 2010) (At the lead plaintiff stage, only typicality and adequacy are "relevant to selecting the lead plaintiff."); *see also Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). Here, the Tesla Investor Group unquestionably satisfies both requirements.

The typicality requirement of Rule 23(a)(3) is satisfied when a movant demonstrates that it "has suffered the same or similar injury as the absent class members as a result of the same course of conduct by the defendant." *Stocke v. Shuffle Master, Inc.*, No. 2:07-CV-00715-KJD-RJJ, 2007 WL 4262723, at \*2 (D. Nev. Nov. 30, 2007) (citing *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). Here, the claims of the Tesla Investor Group, like all other Class members' claims, arise from the same course of events, and their legal arguments to prove Defendants' liability are identical. Like all other Class members, the members of the Tesla Investor Group were collectively damaged when Defendants artificially manipulated the price of Tesla securities by issuing materially false and misleading information starting on August 7, 2018, after Defendant Elon Musk posted a series of false and misleading tweets. Thus, the Tesla Investor Group satisfies the typicality requirement.

The Tesla Investor Group will fairly and adequately represent the interests of the proposed Class. Under Rule 23(a)(4), a representative party must "fairly and adequately protect the interests of the Class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement is met when, as here, (1) "the interests of the class representative coincide with those of the class," and (2) "the class representative has the ability to prosecute the action vigorously." *Shuffle Master*, 2007 WL



4262723, at \*3 (citing *Armour v. Network Assocs., Inc.*, 171 F. Supp. 2d 1044, 1052 (N.D. Cal. 2001) (“adequacy requires the absence of antagonistic interests between class representatives and absent members” and the “willingness and ability to assume the duties of lead plaintiff, including the crucial duties of choosing adequate counsel . . . and monitoring that counsel’s conduct throughout the litigation.”)). The members of the Tesla Investor Group are Tesla investors who have chosen experienced and sophisticated counsel, as discussed more fully below. No antagonism exists between the Tesla Investor Group’s interests and those of the absent Class members; rather, the interests of the Tesla Investor Group and Class members are squarely aligned. Accordingly, the Tesla Investor Group satisfies the adequacy requirement.

#### 4. The Tesla Investor Group Is Precisely The Type Of Lead Plaintiff Group Envisioned By The PSLRA

In addition to satisfying the requirements of Rule 23, the Tesla Investor Group has also demonstrated its commitment to working cohesively in the joint prosecution of this action. *See* Wagstaffe Decl., Ex. D, Joint Decl. The PSLRA expressly provides for multiple investors to serve as Lead Plaintiff in federal securities class actions under the proper circumstances. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii) (providing that the court shall appoint a “person or group of persons” to serve as Lead Plaintiff). Indeed, district courts within the Ninth Circuit have repeatedly recognized the propriety of appointing groups of investors as lead plaintiff “where the group is small and cohesive and/or where the individual members have demonstrated an ability to effectively work together on behalf of the class.” *Markette v. XOMA Corp.*, No. 15-cv-03425-HSG, 2016 WL 2902286, at \*8 (N.D. Cal. May 13, 2016) (citing cases); *Johnson v. OCZ Tech. Grp., Inc.*, No. CV 12-05265 RS, 2013 WL 75774, at \*3 (N.D. Cal. Jan. 4, 2013) (“Small, cohesive groups similar to the [movant] are routinely appointed as Lead Plaintiff in securities actions when they have shown their ability to manage the litigation effectively in the interests of the class without undue influence of counsel.”); *In re Versata, Inc., Sec. Litig.*, No. C 01-1439 SI, 2001 WL 34012374, at \*7 (N.D. Cal. Aug. 20, 2001) (appointing a group composed of sophisticated investors as Lead Plaintiff because they “possess[ed] both sophistication and



1 business knowledge, as well as substantial individual losses which adds meaningful incentive for  
2 a vigorous prosecution of the action”).

3 As set forth in the Joint Declaration, each member of the Tesla Investor Group  
4 individually determined to jointly seek appointment as Lead Plaintiff and litigate this action  
5 independently of counsel and in the best interests of all Class members. *See* Wagstaffe Decl.,  
6 Ex. D, Joint Decl. ¶¶ 7-8; *see also* *OCZ Tech Grp, Inc.*, 2013 WL 75774, at \*3 (appointing group  
7 of investors based on declaration demonstrating commitment to oversee litigation and prosecute  
8 case in the best interests of all Class members); *Bruce v. Suntech Power Holdings Co.*, No. CV  
9 12-04061 RS, 2012 WL 5927985, at \*3 (N.D. Cal. Nov. 13, 2012) (finding that declaration from  
10 movant attesting that it is “committed to protecting the interests of the Class” and will  
11 “vigorous prosecute the action on behalf of the class” supports appointment). The Joint  
12 Declaration also explains when, how, and why the members of the Tesla Investor Group decided  
13 to join forces in this litigation. *See* Wagstaffe Decl., Ex. D, Joint Decl. ¶¶ 7-9. In fact, Dániel  
14 Nemes, the sole owner and Managing Director of group member PROtecto Informatikai  
15 Szolgáltató Korlátolt Felelősségű Társaság, after several lengthy discussions with each of Keller  
16 Lenkner and Labaton Sucharow, specifically requested that both firms work together with him  
17 and other sophisticated and experienced investors to create the broadest representation for all  
18 Class Members.

19 The Joint Declaration also demonstrates that the Tesla Investor Group has already taken  
20 measures to ensure the vigorous prosecution of this action. *See id.* ¶¶ 10-13. Specifically, the  
21 members of the Tesla Investor Group held a telephonic meeting with each other and with  
22 proposed Co-Lead Counsel concerning the allegations in the litigation and the merits of the  
23 claims against Defendants; the PSLRA’s lead plaintiff appointment process; the benefits of  
24 working together to prosecute the litigation, the benefits of sharing resources, and the manner in  
25 which they will jointly make decisions. *See* Wagstaffe Decl., Ex. D, Joint Decl. ¶¶ 10-11, 15. In  
26 addition, the members of the Tesla Investor Group have coordinated their actions and have  
27 communicated with each other to discuss strategy and procedures for directing the litigation and  
28 monitoring counsel. *Id.* ¶ 11. Moreover, at the direction of the Tesla Investor Group, proposed

Co-Lead Counsel Keller Lenkner and Labaton Sucharow has already taken steps to forcefully prosecute this litigation and materially advance the interests of the Class by, among other things: (i) submitting Freedom of Information Act requests to the SEC for all documents and communications produced in connection with the SEC settlements with Defendants; (ii) retaining a reputable expert in corporate governance, Harvey L. Pitt, to consult on potential corporate governance issues (*see* Wagstaffe Decl., Ex I, Pitt Curriculum Vitae); and (iii) preparing a proposed motion to partially lift the PSLRA discovery stay in preparation for the Tesla Investor Group’s intended aggressive prosecution of this litigation, which would be filed simultaneously with the Tesla Investor Group’s Lead Plaintiff appointment (*see* Wagstaffe Decl., Ex H). *See* Wagstaffe Decl., Ex. D, Joint Decl. ¶ 13.

Accordingly, there can be no question that the Tesla Investor Group has established its commitment to zealously and efficiently represent the interests of the Class as members of a Lead Plaintiff group. *See, e.g., In re Versata*, 2001 WL 34012374, at \*6-7 (finding a group composed of sophisticated investors that submitted declarations “providing background information and articulating why [each] member is seeking lead plaintiff status as part of the asserted group” to be “sufficiently cohesive and structured to maximize its individual strengths and sophisticated business knowledge” and to have “exhibited a cooperative spirit”). Because the Tesla Investor Group has already demonstrated its ability to work together in the best interests of the Class, each group member’s losses are properly aggregated for purposes of this Motion.

#### **D. The Court Should Approve the Tesla Investor Group’s Choice Of Counsel**

The PSLRA vests authority in the lead plaintiff to select and retain lead counsel for the class, subject to the court’s approval. *See* 15 U.S.C. §78u-4(a)(3)(B)(v). As such, this Court should not disturb the lead plaintiff’s choice of counsel unless necessary to “protect the interests of the class.” 15 U.S.C. §78u-4(a)(3)(B)(iii)(II)(aa); *see also In re Cohen v. U.S. Dist. Ct.*, 586 F.3d 703, 712 (9th Cir. 2009) (“[I]f the lead plaintiff has made a reasonable choice of counsel, the district court should generally defer to that choice.”) (citing *In re Cendant Corp. Litig.*, 264 F.3d 201, 276 (3d Cir. 2001)). Courts should not disturb the lead plaintiff’s choice of counsel

1 unless necessary to “protect the interests of the plaintiff class.” H.R. Conf. Rep. No. 104-369, at  
 2 35 (1995), *reprinted in* 1995 U.S.C.C.A.N. at 734.

3 Here, the Tesla Investor Group has selected Keller Lenkner and Labaton Sucharow,  
 4 highly-qualified counsel, to serve as Co-Lead Counsel for the proposed Class. Keller Lenkner is  
 5 a leading national law firm representing a broad array of clients as plaintiffs in complex litigation  
 6 at both the trial and appellate levels. Based in Chicago, Keller Lenkner provides unparalleled  
 7 advocacy to individuals, companies, and governmental entities by combining its lawyers’ expert  
 8 legal knowledge with their significant financial experience managing litigation-related  
 9 investments. This unique skillset allows Keller Lenkner to represent clients using alternative-fee  
 10 arrangements in capital-intensive matters, assess litigation risks with a greater degree of  
 11 confidence, and ultimately maximize client recoveries. Attorneys at Keller Lenkner have  
 12 extensive experience litigating securities fraud cases and complex corporate class actions,  
 13 including having litigated the following successful cases at previous firms: *In re Marsh &*  
 14 *McLennan Cos., Inc. Securities Litigation* (S.D.N.Y.) (\$400 million recovery); *In re Freeport-*  
 15 *McMoRan Copper & Gold, Inc. Derivative Litigation* (Del. Ch.) (\$153.5 million recovery,  
 16 representing the second largest derivative settlement in Delaware); *In re Aetna, Inc. Securities*  
 17 *Litigation* (E.D. Pa.) (\$82.5 million recovery); *In re Triton Energy Ltd. Securities Litigation*  
 18 (E.D. Tex.) (\$49.5 million recovery); and *City of Austin Police & Retirement Fund v. Kinross*  
 19 *Gold Corp.* (S.D.N.Y.) (\$33 million settlement). Keller Lenkner was recently appointed lead  
 20 counsel in another case subject to the PSLRA now pending in the Northern District of Illinois.  
 21 *Walleye Trading LLC v. AbbVie*, No. 18-cv-05114. *See* Wagstaffe Decl., Ex. E.

22 Labaton Sucharow has significant experience in prosecuting securities class actions and  
 23 has excelled as lead counsel in numerous landmark securities class actions throughout the United  
 24 States on behalf of defrauded investors. Labaton Sucharow served as a lead counsel in *In re*  
 25 *American International Group, Inc. Securities Litigation*, No. 04-cv-8141 (S.D.N.Y.), in which it  
 26 achieved a recovery totaling more than \$1 billion for injured investors and secured a \$294.9  
 27 million recovery in *In re Bear Stearns Cos., Inc. Securities, Derivative, & ERISA Litigation*, No.  
 28 08-md-1963 (S.D.N.Y.), in which it served as co-lead counsel. In addition, Labaton Sucharow

1 was a lead counsel in *In re Countrywide Financial Corp. Securities Litigation*, No. 07-cv-5295  
 2 (C.D. Cal.), which achieved a settlement of \$624 million—one of the largest securities fraud  
 3 settlements arising from the financial crisis of 2007 and 2008. Labaton Sucharow presently  
 4 serves as co-lead counsel in *In re Goldman Sachs Group, Inc. Securities Litigation*, No. 10-cv-  
 5 03461 (S.D.N.Y.), among other significant investor class actions. *See* Wagstaffe Decl., Ex. F.

6 Likewise, Kerr & Wagstaffe LLP is well qualified to represent the Class as Liaison  
 7 Counsel. Kerr & Wagstaffe LLP maintains an office in San Francisco, California, and James M.  
 8 Wagstaffe has substantial litigation experience in this court. *See* Wagstaffe Decl., Ex. G. Thus,  
 9 the firm is well qualified to represent the Class as Liaison Counsel. *See* Manual For Complex  
 10 Litigation (Fourth) § 10.221 (2004) (discussing role of liaison counsel and noting that “[l]iaison  
 11 counsel will usually have offices in the same locality as the court.”).

12 Thus, the Court may be assured that by granting this motion and approving the Tesla  
 13 Investor Group’s selection of Keller Lenkner and Labaton Sucharow as Co-Lead Counsel and  
 14 Kerr & Wagstaffe LLP as Liaison Counsel, the Class will receive the highest caliber of legal  
 15 representation.

### 16 CONCLUSION

17 For the foregoing reasons, the Tesla Investor Group respectfully requests that the Court:  
 18 (1) consolidate the above-captioned related actions; (2) appoint the Tesla Investor Group as Lead  
 19 Plaintiff; (3) approve its selection of Keller Lenkner and Labaton Sucharow and as Co-Lead  
 20 Counsel and Kerr & Wagstaffe LLP as Liaison Counsel for the Class; and (4) grant such other  
 21 and further relief as the Court may deem just and proper.

22 DATED: October 9, 2018

Respectfully submitted,

23 /s/ James M. Wagstaffe

24 James M. Wagstaffe (#95535)  
**KERR & WAGSTAFFE LLP**  
 25 Frank Busch (#258288)  
 26 101 Mission Street, 18th Floor  
 San Francisco, CA 94105  
 Telephone: (415) 371-8500  
 27 Facsimile: (415) 371-0500  
 wagstaffe@kerrwagstaffe.com  
 28 busch@kerrwagstaffe.com

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*Proposed Liaison Counsel for the Class*

**KELLER LENKNER LLC**  
Ashley C. Keller (*admitted pro hac vice*)  
150 N. Riverside Plaza, Suite 4270  
Chicago, IL 60606  
Telephone: (312) 741-5222  
ack@kellerlenkner.com

**KELLER LENKNER LLC**  
U. Seth Ottensoser (*admitted pro hac vice*)  
1330 Avenue of the Americas, Suite 23A  
New York, NY 10019  
Telephone: (212) 653-9715  
so@kellerlenkner.com

**LABATON SUCHAROW LLP**  
Christopher J. Keller  
Eric J. Belfi  
David J. Schwartz  
Francis P. McConville  
140 Broadway  
New York, NY 10005  
Telephone: (212) 907-0700  
Facsimile: (212) 818-0477  
ckeller@labaton.com  
ebelfi@labaton.com  
dschwartz@labaton.com  
fmccconville@labaton.com

*Counsel for the Tesla Investor Group and  
Proposed Co-Lead Counsel for the Class*